IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, U.A.W.A., A.F. of L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHRMANN, HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a corporation,

Respondents.

BRIEF OF RESPONDENT BRIGGS & STRATTON CORPORATION

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BRIEF OF RESPONDENT BRIGGS & STRATTON CORPORATION

(See Index for Summary of Argument)

A. THE RIGHT TO STRIKE IS PRESERVED BY THE WISCONSIN LAW AND IS NOT INVOLVED HERE

No question is involved in this case as to the right of employees in Wisconsin to strike. That right has long been expressly recognized and protected both by court decisions, State ex rel *Zillmer v. Kreutzberg*, 114 Wis. 530, 90 N.W. 1098 (1902); *Wisconsin Employment Re-*

lations Board v. Allis-Chalmers Workers Union, 252 Wis. 43, 30 N.W. 2d 183 (1947), and by several statutes;

> "The following acts, whether performed singly or in concert, shall be legal: (a) ceasing or refusing to perform any work * * *." *Wis. Stats.* 103.53(1)

> "Employees shall have the right * * * to engage in *lawful*, concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." *Wis. Stats.* 111.04 (emphasis supplied)

Unlike most states, Wisconsin even has what amounts to a statutory definition of a strike.

> "A strike or lockout shall be deemed to exist as long as the usual concomitants of a strike or lockout exist; or the unemployment on the part of the workers affected continues; or any payment of strike benefits is being made; or any picketing is maintained; or publication is being made of the existence of such strike or lockout." *Wis. Stats.* 103.43(1a)

Wisconsin is recognized as a leader in enlightened, advanced, social legislation and a zealous guardian of individual and civil rights. In 1939 it enacted the Wisconsin Employment Peace Act, *Wis. Stats.* Chap. 111, (referred to herein as the Act), a carefully drawn, comprehensive code of labor relations for the protection of employers, employees and the public.

Its statement of purpose repudiates the attack here made upon it and in part is as follows:

> "Section 111.01. The public policy of the state * * * is declared to be as follows:
>
> "(1) * * * There are three major interests involved namely: that of the public, the employe and the employer. * * * It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of others.

"(2) Industrial peace, regular and adequate income for the employe, and uninterrupted production of goods and services are promotive of all of these interests.

"(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employe and the employer alike, to establish *standards of fair conduct* in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated. While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat." (Emphasis supplied)

The Act then sets out the guaranty of protection for lawful concerted activities (Section 111.04 quoted above), and then designates as "unfair", a number of activities of both employers and employees recognized to be harmful and detrimental to employees, employers and the public.

As pertains to this case, the following practices of employees, individually or in concert, are denominated as unfair conduct.

"Section 111.06(2)(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in Section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

"(h) To take unauthorized possession of property of the employer or *to engage in any concerted effort to interfere with production* except by leaving the premises in an orderly manner for the purpose of going on strike." (emphasis supplied)

The last section is the one particularly criticized by the Union here.

The Act sets up the Wisconsin Employment Relations Board (called the Board herein) to administer its provisions and provides the procedures for filing charges, conducting hearings and for court review.

Finally and conclusive of Wisconsin's positive protection of the right to conduct a lawful strike, the Act provides:

> "Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech." *Section 111.15 Wis. Stats.*

The brief of the Wisconsin Attorney General demonstrates that the section attacked, as interpreted by the Wisconsin Supreme Court, *in its application to the facts* presented, constitutes no deprivation of any constitutional or federal right. It is a reasonable curb upon unbridled license and unwarranted attempts at seizure and control of the means of production and livelihood, while leaving inviolate the right of employees to withhold their service and to exert economic pressure on employers through a recognizedly lawful strike.

The Wisconsin Supreme Court has correctly summarized the principle involved in this case as follows:

> "The right to strike is a valuable right which not only the congress and legislatures of the various states but the courts, federal and state, have sought to guard and protect, but the right to strike does not include the right to commit assaults, destroy property, *deprive other people of the right to earn their living in the place where they are employed.*" *Wisconsin Employment Relations Board v. Allis-Chalmers Workers Union*, 252 Wis. 43, at 51 (1947) (emphasis supplied)

B. THE FINDINGS OF FACT ARE SUPPORTED BY COMPETENT CREDIBLE EVIDENCE

1. The Rule Governing the Case.

The Wisconsin Act provides:

> "Findings of fact made by the Board, if supported by credible and competent evidence in the record, shall be conclusive." *Wis. Stats.*, Section 111.07(7)

The rule that findings of fact, both of courts and properly empowered administrative tribunals, will not be disturbed on appeal if supported by substantial evidence is so elementary, and has been so frequently and emphatically declared and adhered to by this court that citation of authorities is unwarranted. This case in its last analysis rests upon a question of fact.

The Board found as the essential facts, "That all such work stoppages were engaged in for the purpose of interfering with the production of the company * * * *" (Finding 8, R. 16) and "* * * no strike has been called by the respondent union nor by the employees of the Briggs & Stratton Corporation against the company at any time" (Finding 11, R. 17).

Because in our view that the case turns on the single question of whether these findings of fact are supported by the evidence, a somewhat detailed analysis of the facts constitutes a necessary portion of our argument.

2. Analysis of the Facts.

Briggs & Stratton Corporation (herein termed "Company") is a manufacturer, principally of small gas engines, automobile locks and kindred products, with two plants about 1½ miles apart, known as the "East" and "West" plants, in the City of Milwaukee, Wiscon-

sin (R. 33). There were approximately 1,000 employees in each plant (R. 33). The bulk of Company's production employees are represented by the Petitioner Union, and no other union is a bargaining representative for any of Company's employees (R. 33).

A contract between Union and Company expired July 1, 1944 (R. 15). During 1944 and 1945, there had been proceedings, at the instance of the Union, before the National War Labor Board in respect to demands for maintenance of membership, check-off, vacations, wages and other items, and while there had been bargaining negotiations, no new contract was reached during that period (R. 35).

The East Plant first shift hours were from 8 A.M. to 5 P.M., and from 3:30 P.M. to 12 Midnight for the second shift. At the West Plant the shifts were from 7 A.M. to 3:30 P.M. and 3:30 P.M. to Midnight (R. 35). Those had been the regularly scheduled hours for a considerable period (R. 35). Both plants had been operating steadily, most of the production employees being on a five-day week (R. 35).

The first of the incidents out of which this litigation arose, occurred on November 6, 1945 when at 1:30 P.M., without previous notice or warning to the Company, 1,322 employees on the first shift in both plants left their work (R. 36), and none of the 205 employees on the second shift reported for work (R. 36). The first shift employees did not return to work that day. All entered the plants to work the next morning (R. 36). At that time no reason was given to Company for this production stoppage (R. 36).

On November 16, 1945, 614 first shift employees at the East Plant and 746 employees at the West Plant left

work without notice at 1:30 P.M., (only 13 remaining), but the second shift employees at both plants reported and worked (R.36).

From the first occurrence on November 6, 1945, up to March 22, 1946, twenty-seven of such production tie-ups occurred (R. 36). The starting times of the interferences varied,—sometimes commencing at 11:00 A.M., or 9:30 A.M. and even as early as 8:30 A.M. (R. 37). With one exception, when timekeepers returned, none of the employees who left their work returned to work during that shift (R. 36). On January 7, 1946, a number of employees in both plants, without leaving the plants, engaged in a sitdown lasting throughout the shift, resulting in a general cessation of production (R. 36-37).

The production interferences, including two failures to report in on scheduled work days, were spaced as follows:

1945

Tuesday,	November 6,	Thursday,	December 20,
Friday,	November 16,	Monday,	December 24,
Tuesday,	December 4,	Friday,	December 28,
Thursday,	December 6,	Monday,	December 31,

1946

Monday,	January 7, (sitdown)	Friday,	February 15,
Tuesday,	January 8,	Thursday,	February 21,
Friday,	January 11,	Friday,	February 22,
Wednesday,	January 16,	Monday,	February 25,
Friday,	January 18,	Friday,	March 1,
Wednesday,	January 23,	Tuesday,	March 5,
Friday,	January 25,	Friday,	March 8,
Monday,	February 4,	Thursday,	March 14,
Wednesday,	February 6,	Friday,	March 15,
Friday,	February 8,	Wednesday	March 20,
Wednesday,	February 13,	Friday,	March 22,

(Exhibit 2, (R. 37; 86))

Each of the occurrences completely stopped production at both plants. After the second or third stoppage, the Union's bargaining committee (including some of the Petitioners) told the Company's production vice-president that the reason for the stoppages was so that the employees could attend a Union meeting (R. 37). About the middle of December, 1945 the Union's bargaining committee told the same Company officer that the stoppages were "spontaneous", caused by the employees and not by action of the Union (R. 37). The bargaining committee repeatedly told the Company's production vice president that these stoppages *were not strikes*, and that they would not call a strike (R. 39).

On February 10, 1946, *The Milwaukee Journal*, a daily newspaper, published a report of an interview with petitioner Anthony Doria, Secretary-Treasurer of the International Union, with which the Petitioner Union is affiliated. The report (Exhibit 6, R. 46, 86-89) which Mr. Doria testified quoted him substantially correctly (R. 45-46) noted these statements of Mr. Doria in respect to the conduct being engaged in at Company's plants:

> "If you called this a new form of strike you would be making a bad mistake." (R. 87)
>
> "It is a labor weapon actually designed to avoid a strike and the hardships which a strike imposes on the workers. We think it is a better weapon than a strike." (R. 87)
>
> "We analyzed the picture very thoroughly before we arrived at this idea." (R. 87)
>
> "Under the new method meetings are called for anyone or more of three possible reasons — any new development in negotiations which might arise with respect to neutral labor boards, any development in

direct negotiations with management, and finally any time the leadership feels management has started a rumor detrimental to the Union's security." (R. 87-88)

"The meetings are called without warning and take the Company by surprise. They find it difficult to make commitments and plan production." (R. 88)

"This can't be said for a strike. After the initial surprise of the walkout the Company knows just what it has to do and plans accordingly." (R. 88)

"Management can't plan for this new sort of thing." (R. 88)

"Then if, as a last resort, management decides to close shop and force the workers out, it can properly be called a lock-out." (R. 88)

Mr. Doria further said that the new weapon was predicated on the section of the National Labor Relations Act "which states that every group of employees is entitled to engage in activities for its mutual protection". (R. 88)

Subsequently, at the hearing before the Board, Mr. Doria testified that the intent of the stoppages was to interfere with production; that the plan was his idea; that he wanted to avoid the hardship of a strike; that the method was accepted *to replace* the full time strike; that they wanted to use some form of economic pressure (R. 47); but that the real purpose was to interfere with production (R. 49).

During the period in question, work at Company's plants was scheduled a month or forty-five days in advance on the basis of working full time (R. 38). The work interruptions greatly curtailed production, delayed shipments to customers (R. 37), caused inventories to pile up in the plants (R. 38), and the Company sustained

substantial loss and damage from the production stoppages (R. 40). The stoppages caused an unusual turnover of employees (R. 39).

Company did not discharge, lay-off, or discipline any employees as a result of these activities (R. 36, 40), though it repeatedly requested the Union's bargaining committee to stop these tactics (R. 40).

A number of employees who refused to participate in the procedure had their lockers, clothing, tools and other personal property damaged, stolen, or concealed, and were subjected to threats, coercion, and intimidation (R. 50-70).

There was no vote taken by secret ballot to call a strike preceding any of these work interferences (R. 66).

On February 23, 1946, the Company filed a complaint with the Board against the Petitioners, consisting of the Union, its officers, and bargaining committee, alleging that the conduct described constituted unfair labor practices under the Wisconsin Act and praying for a cease and desist order (R. 25-29), to which Petitioners answered (R. 30-31). Trial was had before the Board commencing March 26, 1946 (R. 32), at which the testimony developed without material dispute, the facts hereinbefore set out (R. 33-86).

On May 11, 1946, the Board made its findings of fact and conclusions of law and order, accompanied by a memorandum opinion (R. 14-21). Among other things, the Board found as facts that on the twenty-seven occasions in question the employees left their employment during working hours without consent of the Company, at the instigation of the Petitioners, to attend Union meetings "for the purpose of interfering with the production

of the Company" to compel the Company to accede to the Union's demands (R. 16); that Petitioners threatened employees who failed to engage in such work stoppages and several of such employees had their lockers, clothing or tools damaged or concealed and were subjected to assaults and threats of violence, principally on Company's property (R. 16); that Company's employees in the bargaining unit represented by Petitioner Union "never conducted a vote of any kind at which the Union was directed to call a strike, and that no strike had been called by the Union or by the employees at any time" (R. 16).

As conclusions of law, the Board found that Petitioners were guilty of unfair labor practices under the Wisconsin Act by

> "(a) Engaging in a concerted effort to interfere with production in a manner other than by leaving the premises in an orderly manner for the purpose of going on strike.
>
> "(b) Coercing and intimidating employees by threatening punishment if they fail to engage in such unlawful efforts to interfere with production." (R. 17)

The Board's order directed Petitioners to cease and desist from such or other concerted interferences with production except by leaving the premises in an orderly manner for the purpose of going on strike (R. 17-18), and to cease such coercion or intimidation of other employees (R. 18); and directed the Petitioners to post notices that the Petitioners would cease such conduct (R. 18).

The Petitioners failed to comply with the Board's order and the Attorney General of Wisconsin, acting for

the Board, instituted proceedings in the Circuit Court of Milwaukee County for confirmation and enforcement of the Board's order (R. 12-14), to which the Petitioners answered (R. 21-22).

The Petitioners also commenced proceedings pursuant to the Wisconsin Act to review the Board's findings and order and the two proceedings were consolidated for purposes of "hearing, argument and decisions" (R. 23).

The Circuit Court heard the matter on the record (R. 23) and the presiding judge filed a decision (R. 1-12), in which he concluded that leaving the Company's premises to attend union meetings, thereby creating work stoppages, constituted a "strike" within the exception of the Wisconsin Statutes (R. 6, 10) and that the Wisconsin Board's order to cease and desist was in this respect erroneous (R. 10); but that the portion of the Board's order directing cessation of intimidation of other employees was entitled to enforcement (R. 10-11). Judgment was entered modifying the Board's order by striking the part determined to be erroneous but adjudging that the other part of the order be enforced (R. 23-25).

From that judgment, the Wisconsin Board and the Company, separately, appealed to the Supreme Court of the State of Wisconsin (R. 98-99) and Petitioners filed notice for a cross review of that portion of the Board's order confirmed by the Circuit Court judgment (R. 101-102). The Supreme Court of Wisconsin reversed the judgment of the Circuit Court and remanded the cause with directions to enter judgment sustaining the order of the Board as interpreted by the Wisconsin Supreme Court and for enforcement of that order (R. 121).

3. The Findings that the Production Interferences Were Not Strikes Is Based on Essential Factual Elements Supported by Substantial Evidence.

Whatever definition or concept may be adopted as a standard, a "strike" cannot be inadvertent. Inherent in any concept of the term must be intention and volition. The quitting of the employment must be with the *intent to strike*. If the intent be with any other purpose it cannot and does not conform to either the popular or the legal understanding of action comprehended within the term "strike". Here the Petitioners caused the Company's employees to stop production entirely in both plants by breaking off work in the middle of a work day with no intention whatever of going on a strike but with the definite purpose of resuming work the next day.

This was done repeatedly over a period of months, on a pattern of unpredictable timing calculated to damage the Company by crippling production and preventing the Company from conducting a planned, integrated and continuous operation of its business. At no time during the period while these production interferences were being inflicted did the Petitioners attempt to negotiate with the Company for cessation of the practice as a part of or on any terms of collective bargaining.

The Petitioners repeatedly asserted to the Company that these production stoppages were for the sole purpose of the employees attending union meetings. They did in fact actually attend meetings and if the purpose was in fact to attend such meetings, then obvi usly the purpose was *not* to go on strike. Certainly the Board was justified in drawing the inference that no strike took place.

Petitioners also asserted to the Company at another time that the production stoppages to attend such union

meetings were not at the instance of the Petitioners but were the "spontaneous" action of the employees who were union members. These representations were later proven to be untrue when at the hearing before the Board, Petitioner Doria testified as to his origination of these tactics as means of inflicting economic pressure on the Company while at the same time *avoiding* having the employees go on strike and also denying to the Company any protective procedure which would have been available to it had the employees actually gone on strike.

Further evidence that the animating concept and intent was not to strike was the fact shown by the evidence and found by the Board that at no time had a vote of the employees been taken by secret ballot for a strike, a condition without which a strike would be an unfair labor practice under the Wisconsin Statutes (Section 111.06(3)(e)).

The matter of intent is not a matter of law; it is a matter of fact.

> "Such an intent already formed is a fact just as much as any other physical fact." *Baker v. W.U.T. Co.*, 134 Wis. 147 at 153; 114 N.W. 439 (1908); *Retail Clerk's Union v. Wisconsin Employment Relations Board*, 242 Wis. 21 : 6 N.W. 2d 698 (1942)

There is another significant factual feature of the procedure. While it is no doubt true that one of the purposes was to coerce the employer into acceding to demands, it was established as a fact before the Board that that was not the sole, nor perhaps even the most important purpose. In fact Exhibit No. 6 quotes Mr. Doria as saying that the "meetings are called for anyone or more of three possible reasons,—any new development in negotiations which might arise with respect to neutral labor boards, any development in direct negotiations with management

and finally any time the leadership feels management has started a rumor detrimental to the union security". (R. 87-88).

At the hearing Mr. Doria said he didn't use the expression "neutral labor boards" but had meant any agency of government having jurisdiction (R. 46). However, while the Union's brief emphasizes the "demand" purpose, the important point is that the Union's position, if sustained here, would mean the production interferences could be indulged in even when the Union had no bargining demand whatever and at any time the "leadership feels" management has done something which is detrimental to union security. Furthermore, the facts demonstrated that in the instant situation no specific bargaining demands were ever made before each or any of the walkouts.

In other words, the cessation of these coercive efforts was never presented to the Company, directly or indirectly, by the Petitioners as a condition which would obtain if either particular or general bargaining demands were met. So far as the Company and the Board were ever informed, even if the Company acceded to whatever the Union demanded, the "weapon" would still remain aimed at the employer, to be used at the pleasure of the "leadership" according to the whims of its "feelings".

Whether a given activity is a strike is a question of *fact*. The Petitioners formulate some elements of a strike at page 35 of their brief, indicating reliance on Webster's Dictionary. We do not find in the Webster edition cited the elements as set forth in Petitioners' brief. We do find as the first element "an act of *quitting*", not merely "*stopping*" work. However, what the courts have said is more applicable here than a dictionary definition.

Section 1 of Act of July 5, 1935, 49 Stat. 499, U. S. Code, Title 29, Sec. 151-166 (Wagner Act 1935) provides:

> "* * * refusal by employers to accept the procedure of collective bargaining lead to strikes and *other* forms of industrial strife * * *" (our emphasis)

This recognizes the existence of other forms of economic warfare or labor weapons different from strikes.

In Section 2(3) of that Act, an "employee" is defined to "include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute * * *" (our emphasis). Thus employees who are on *strike* retain their status as employees and such a situation exists only when the employees have *"ceased"* (stopped, ended) their work and not when they are insisting on continuing to work with self-declared, intermittent, interruptions.

The case of *National Protective Association of Steam Fitters and Helpers v. Cummings*, 170 N.Y. 315, states a commonly accepted definition of a strike thus, "A strike is to *cease* working in a body by pre-arrangement *until a grievance is redressed*". (our emphasis)

The Restatement of the Law of Torts, Volume 4, Section 797, defines a strike as follows:

> "A strike is a *continued* refusal by employees to do *any* work for their employer, or to work at their customary rate of speed *until the object of the strike is attained*, that is, *until the employer grants* the concession demanded." (our emphasis)

The same authority points out that it is not a strike if employees *temporarily* stop work, even though using the stoppage as an attempt to exact a concession and gives the following illustration:

> "A's employees, after consulting with each other, decide to have a picnic on a certain day. They request A's permission to be absent on the afternoon of that day. A refuses. The employees nevertheless cease work at noon and hold their picnic. *This stoppage is not a strike.*" (our emphasis)

There are many types of concerted activities by employees to bring pressure upon employers to yield concessions which have not been recognized to be strikes or to be legitimate, for example, the slow-down; a refusal to work scheduled hours as in *Mt. Clemens Pottery Co.*, 46 N.L.R.B. 714; a refusal to do assigned work as in *Niles Firebrick Co.*, 30 N.L.R.B. 426; ten to twenty minute stoppages of the production line in *Cudahy Packing Co.*, 29 N.L.R.B. 837; the refusal of waiters to serve meals at the scheduled time in *New York State L.R.B. v. Union Club of the City of New York*, 266 App. Div. (N.Y.) 516; the attempt to control shift time by coming in early as in *Harnischfeger Corp.*, 9 N.L.R.B. 676; the boycott; the refusal to work on material from strike-bound plants; the refusal to work on non-union goods and the sit down so severely condemned by this court in *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 80 L. ed. 627.

Another union announced its own schedule of days on which certain employees would report. This was properly condemned by the court in *Home Beneficial Life Ins. Co. vs. N.L.R.B.*, 159 Fed. 2d 280, (4th CCA) (1947). In that case the union representatives carefully avoided the use of the word "strike" for the concerted withholding of work on certain scheduled days. The Union did declare and stage a genuine strike somewhat later. The court held *the original activity did not amount to a strike* and said:

"The statute (Sec. 7 (Wagner Act), * * * does not and could not confer on them (the employees) the *right to engage en masse in unlawful activities*, or, to defy the authority of the employer to manage his business *while remaining in his service*. When they engage in an unlawful sit-down strike, as in (cites *Fansteel* case), they may be discharged by an employer, even though he has been guilty of unfair labor practices; and when, as here, *they refuse to obey the rules laid down by a law-abiding management for the conduct of the business*, they may be discharged and their places may be permanently filled". @ 284 (our emphasis and parenthetical insert)

A situation practically identical with the facts here is found in *C. G. Conn Limited v. National Labor Relations Board*, (7th C.C.A.) 108 Fed. 2d 390 (1939) where, when certain wage demands were not granted, the employees, without prior notice, stopped work in a body before the end of the scheduled work period, but returned to work at the regular time the next day indicating that they intended to continue the practice. The employees were disciplined and they brought charges of unfair labor practices before the National Labor Relations Board asserting that the procedure was a "strike" for which the employer could not impose discipline.

Because the factual situation is so close to that here and the court's analysis so ably points out the impropriety of the conduct on general principles we quote at some length for the convenience of the court:

"We are supplied with numerous definitions of the word 'strike'. They are all substantially alike and we quote from American and English Encyclopedia of Law, Volume 24, page 123, as follows: 'The term "strike" is applied commonly to a combined effort on the part of a body of workmen employed

by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a pre-arranged time, and *refusing to resume work until the demanded concession shall have been granted.*'" @ 396

"We are of the opinion that the facts in the instant situation do not bring the discharged employees within this or any other definition of the word 'strike' of which we are aware. We are *unable to accept respondent's argument to the effect that an employee can be on a strike and at work simultaneously.* We think he must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance." @ 397

* * *

"(8) Even, if it be assumed that there was a labor dispute, within the meaning of 2(9) the *fallacy of this argument to us lies in the fact that the employees did not cease work in consequence of such dispute.* Undoubtedly, when petitioner refused to comply with their request, there were two courses open. First, they could continue work, and negotiate further with the petitioner, or, second, they could strike in protest. *They did neither, or perhaps it would be more accurate to say they attempted to do both at the same time.* We have observed numerous variations of the recognized legitimate strike, such as the 'sit-down' and 'slow-down' strikes. It seems this might be properly designated as a strike on the installment plan.

"We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees *ceased* work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employ-

ment it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." @ 397 (our emphasis)

In the case of *Sandoval v. Industrial Commission*, (1942), 110 Colo. 108, 130 Pac. 2d 930, the court said:

"A strike possesses at least four ingredients other than the suspended employer-employee relationship which has been mentioned, namely: (1) A demand for some concession, generally for a modification of conditions of labor or rates of pay; (2) a refusal to work with intent to bring about compliance with the demand; (3) an *intention* to return to work *when compliance is accomplished;* * * * " (our emphasis)

The Act of June 25, 1943, Public Law 89, 78th Congress (Smith-Connally Act) was for the purpose of trying to reduce strikes, Section 8-A provided that;

"(1) The representative of the employees of a war contractor, shall give to the Secretary of Labor, the National War Labor Board, and the National Labor Relations Board, notice of any such labor dispute involving such contractor and employees, together with a statement of the issues giving rise thereto.

* * *

"(3) On the thirtieth day after notice under paragraph (1) is given by the representative of the employees, unless such dispute has been settled, the National Labor Relations Board shall forthwith take a secret ballot of the employees in the plant, plants, mines, mine, facility, facilities, bargaining unit or bargaining units, as the case may be, with respect to which the dispute is applicable on the question whether they will permit any such interruption of war production."

It is highly significant that *no notice or vote to comply with that Act was ever taken in this case* and shows that

the employees here and their Union never deemed their procedure to be a strike.

The Wisconsin law contains a somewhat similar requirement for a strike vote and the Union's failure to comply with that requirement also proves the same thing.

Obviously Congress never intended that a series of short intermittent walkouts would be deemed strikes since if they were, then before each of the walkouts, the employees would have to give a thirty day notice and the Board would have had to conduct a strike vote,—in this case twenty-seven between November, 1945 and March, 1946. No such ridiculous situation was contemplated by Congress and the obvious conclusion is that such tactics were never deemed by Congress to rise to the dignity of a strike.

The earliest Wisconsin case dealing with the meaning of the word strike is *State ex rel Zillmer v. Kreutzberg,* 114 Wis. 530, 590 N.W. 1098, (1902) where the court said:

> "* * * included in the meaning of the word 'strike' was the mere concurrence of a number of individuals in the exercise of their inherent right to *quit* their employment, * * * " (our emphasis) @536.

In the case before the court, the employees vigorously claim they did not in any sense "quit", but on the contrary assert they held on to their jobs which they could work at hours fixed by themselves.

In *Walter W. Oeflein, Inc. v. State,* 177 Wis. 394, 188 N.W. 633 (1922) the question was whether a strike was in existence when an employer advertised for labor. If it was, the employer had violated (present) Section 103.43 Wisconsin Statutes which prohibits advertising

for labor without indicating that a strike is in existence, if such is the fact. The court said:

> "Webster's New International Dictionary, on page 2058, defines the word 'strike' as follows: 'An act of *quitting* when done by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on their employer'."
>
> * * *
>
> "The number of men necessary to constitute a strike in refusing *to continue work*, pursuant to united effort, *depends in each case upon the peculiar facts in the case*, and no definite rule can be laid down. The legislature did not see fit to define the term 'strike', but on the contrary used the term *in the sense that it is ordinarily used in* connection with labor troubles and as defined by standard authorities upon the subject." @ 399 (our emphasis)

In 1925 the Wisconsin Supreme Court was again confronted with a prosecution under the same statute and said:

> "There can be no question but that when by concerted action, a number of the company's employees *quit* work on October 22nd because of the proposed cut in wages, they then entered upon a lawful strike as such term is understood and declared." *West Allis Foundry Company v. State*, 186 Wis. 24, @ 28, 202 N.W. 302 (our emphasis)

The majority held that the strike had ended but Justice Charles H. Crownhart, well known friend of labor, wrote a dissenting opinion to the effect that, on the facts, the strike still existed. A portion of his remarks have important bearing on the subsequent Wisconsin law:

> "*The real test of a strike must be*: Are the *usual concomitants* of a strike still attached to the situation; are the men *still out;* are pickets kept up; are the union and union papers *still* publishing notices

of the strike; is pressure still maintained on the employer by which he is burdened financially, or physically and mentally impressed; are men prevented from accepting employment at the plant by reason of the conditions existing with reference thereto; are strike benefits *still* being paid; is the action of the employees, or the union in their behalf, to maintain the strike in good faith with some hope of ultimate success? If any or all of these questions may be answered in the affirmative, there is some evidence of a strike actually existing, *and if most of them exist,* as they did in this case, then the *fact* of a strike actually existing is sufficiently established, as the term 'strike' is used in the act before us." (our emphasis) @39

This decision was rendered in February, 1925 and in June, 1925, the Legislature enacted Wisconsin Statute, Section 103.43 (1a) and thereby incorporated into the Wisconsin statutory law this definition of a strike previously quoted herein:

"A strike or lockout shall be deemed to exist as long as the *usual* concomitants of a strike or lockout exist; or the *unemployment* on the part of the workers affected continues; or any payments of strike benefits is being made; or any picketing is maintained; or publication is being made of the existence of such strike or lockout." (our emphasis)

This definition accords with the general understanding and confirms the proposition that *whether or not an activity in a given case is a strike is a question of fact on the evidence submitted in the particular case.*

Applying that statute here, virtually none of the prescribed concomitants of a strike (i.e. factual elements) were present. The employees were never "still out"; there was never any picketing; the union, instead of publishing the existence of a strike, was publicly declaring

that the procedure did not constitute a strike; no one was being prevented from accepting employment at the plant and no strike benefits were being paid.

The Petitioners argue that the duration of the withdrawals is not the test of whether an activity constitutes a strike. We agree. We emphatically insist, however, that the authorities establish that the question of the *intent* is one of the fundamental *facts* which determines whether a work stoppage is or is not a strike.

The public declaration of the persons who devised this technique that the stoppages were not strikes, is the clearest evidence of what the intent was;—namely *not to strike.*

Several varying and contradictory statements of the intent of the employees were given.

(1) The stoppages were said to be "spontaneous" and without assigned purpose.

(2) The intent was stated to be merely to attend "union meetings"—the causing of injury to the employer was merely an incident.

(3) The intent testified to was to interfere with production and inflict economic loss and injury on the employer and eliminate the possibility of the employer protecting himself.

(4) Finally the last intent, *advanced for the first time after the hearing before the Board,* was that the intent was to "strike".

Not only is it true that *intention* is one of the vital elements in determining whether a given activity constitutes a strike, but, as we have seen, whether a given intention did or did not exist *is a question of fact.*

The Wisconsin Board had before it the Union's repeated assertions that the walkouts were not *intended* as strikes and did not constitute strikes and were with the intent of preserving to employees, rights which could not be preserved if the stoppages actually were strikes, and that the *intent* was to impose upon the employer a prolonged series of intermittent stoppages of production which would come without advance notice, could not be planned for, and which would exert a crippling effect on all efforts for planned operation of the business.

Bearing on this intent, the Board also had before it the fact that there had been no advance secret ballot for a strike as required by the Wisconsin Act or by the Smith-Connally Act which was evidence of no small significance on the issue of whether a strike was intended. Furthermore, there was before the Board the earlier conflicting assertions of the Union that the purpose of the stoppages were in no wise intended to interfere with production, but merely to allow the employees to attend bona fide Union meetings, which assertions were later repudiated by the Union.

On the other hand there was before the Board virtually nothing except the *arguments* of the Union's counsel that the stoppages did constitute strikes. That latter assertion would hardly be legally sufficient as evidence to raise an issue of fact as to the intent animating the work stoppages. While it is doubtful that the record before the court disclosed any evidence which could be considered substantial enough to support a finding that the intent was to strike, even if we assume, for the purpose of argument, that the record reflects some evidence that the intent was to strike, *the Board found to the contrary*. Such finding would seem to be conclusive on the courts and all

the Justices of the Wisconsin Supreme Court adopted the same view of the factual aspects of the procedure and agreed that it was not a strike (R. 122).

It is recognized that findings of a state tribunal do not foreclose the United States Supreme Court from examining the facts to see whether a finding is without substantial support in determining whether a federal right has been denied, *Truax v. Corrigan*, 257 U.S. 312, 66 L. Ed. 254, 42 Sup. Ct. Rep. 124 (1921). This is for the purpose of assuring that federal rights be not defeated "by insubstantial findings of fact screening reality". But when the findings of the State Court rest on substantial, or as here, virtually undisputed evidence, and have been authenticated by the highest Court of the State, those findings are regarded by the United States Supreme Court as conclusive, *Milkdrivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 85 L. Ed. 836 at 841, 61 Sup. Ct. 552 (1941).

These repeated maneuvers called with the intent on the part of the Petitioners and the employees that they should *not* be, in fact, strikes,—called with the positive intent of preserving to the employees benefits not thought to be preservable in a strike,—called with the affirmative intent of inflicting severe damage (different and less susceptible to mitigation than the damage resulting from a strike), —called without in any instance being conditioned upon accession to any specific or general bargaining demand, —called, when the leadership so desired, for purposes wholly unrelated to bargaining demands (such as to combat rumors),—and called without taking the vote by secret ballot in any instance as required as a condition precedent to a strike under the Wisconsin Statutes, all lack in important factual respects vital elements of the concept of a strike whether tested by traditional legal

concepts or by popular understanding or by the sense in which the term "strike" is used in the Wisconsin Statutes.

The subsequent pretext on the part of the Petitioners, urged for the first time after the hearing before the Board that these production stoppages were intended as or constituted strikes is contrary to the facts as found by the Board and by the Wisconsin Supreme Court on virtually undisputed evidence.

4. The Purpose of the Procedure Was to Control the Means of Production and to Fix the Working Conditions by Means Other than a Strike.

The purpose of this "new tactic" was plainly to create the effect and obtain the result of the sit down strike, so vigorously denounced by this Court in *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 83 L. Ed. 627, 59 Sup. Ct. 490 (1939), and yet to avoid, if possible, its exact features in the hope of circumventing the universal criticism of that plan.

The Wisconsin Act, passed in 1939, was drafted in the light of the experience of the late thirties, which included the development of the sit down strike and the slowdown and a period of widespread and bitter strikes. While the legislature could not foresee all of the new "weapons" which might be devised, it plainly anticipated that there might be variations of the sit down, slow down or other equally unwholesome activities aimed at controlling the means of production. The legislature therefore adopted the phrase "concerted interferences with production" to apply to such actions, and banned them, while expressly excepting from such ban, the strike as then generally recognized.

The Union's argument ignores the most fundamental and elementary rules of the employer-employee relationship since its position is that the employees may themselves start work or stop work at will without regard to the employer's wishes or direction and that the employer is helpless to control such action by the employees.

> "Among the fundamental duties of the employee is the obligation to yield obedience to all reasonable rules, orders, and instructions of the employer * * *" 35 Am. Jur. 478.

> " * * * the really essential element of the (employer-employee) relationship is the right of control * * * The test of the employer-employee relation is the right of the employer to exercise control of the details and method of performing the work." 35 Am. Jur. 445-6 (our parenthetical insert)

When an individual accepts the status of an employee, in consideration of certain benefits that accrue to him, he likewise assumes certain obligations and responsibilities and he necessarily relinquishes and waives certain rights which he would otherwise have. By his implied contract of employment, he agrees to work such reasonable hours as are fixed by the employer. To put it conversely, he agrees that *while the status exists*, he will not fail to work those hours, (excepting in the event of generally recognizable excuses such as illness, impossibility and the like). A further exception to his agreement not to fail to work is his right (unless waived by express contract) to strike:—that is to fail to work because of participation in a concerted withholding of work with others until some legitimate demands have been obtained or settled—a procedure having well developed characteristics and commonly recognizable features.

In a true strike the employees stay away from work, they advertise the existence of a strike, they try to persuade others to join them, they picket, they meticulously eschew the performance of any work whatever for the employer. The employer's plant and facilities remain unoccupied and he is at liberty to try to find new employees or to close down his shop.

Here the employees seek to repudiate all the fundamental characteristics of the relationship by asserting the *right* to do none of the things which characterize a strike and claiming the right to fix the hours of work, to maintain control over the tools of production, to force the employer to have idle machines for intermittent periods, to prevent others from working in their places, and yet asserting that the relationship remains intact.

The Union leaders publicly asserted (and Petitioners' brief asserts) that the National Labor Relations Act protected this situation (R. 88) and the leaders threatened that if the employer sought to protect itself or to discipline the employees, it would be guilty of unfair labor practices under the provisions of that act guaranteeing certain concerted activities. No such perversion of the beneficial purposes of that Act should be countenanced.

Wisconsin recognized the elementary principles involved. It seeks to require employees to abide by their contract of employment, to discourage breaches thereof and to increase the likelihood of continued production while the employee-employer status exists, for the protection and welfare of all segments of its public including employees and employers.

The Wisconsin Act carefully preserves to the employees the right to endeavor to enforce employers to accede to demands by what everyone understands to be

a strike, the concerted refusing to continue work until the controversy has been resolved and the Union's strained argument as to involuntary servitude is just sheer nonsense. Despite Petitioners' attempt to torture the decision below into the imposition of "involuntary servitude"; it is clear that the employees are perfectly free to withhold their services. They have only been directed not to interfere with production by the specific conduct here adopted, but they are free to leave the premises and go on strike if they so choose. This is such a far cry from any conception of involuntary servitude as to make the claim in that regard ridiculous. For the preservation of the interests of all its citizens, Wisconsin has said that employees, while still insisting on the right to work as employees, shall not engage in sitdowns, secondary boycotts, slowdowns *or other concerted efforts to interfere with production* except strikes. Wisconsin placed a reasonable limit on the chaos and confusion which it will permit in the efforts of its citizens to produce goods.

The Union's brief glosses over the grave practical public policy involved which is of vital interest to the welfare of employees, employers and the public alike. *If this device were actually given legal sanction, a long step toward usurpation of management by the Unions would be taken.*

The Union leader testified he had requests from 350 unions to see how the new tactic works (R. 179), implying that if the procedure "stood up" the tactic would be widely used.

Despite the Union leaders' threat of unfair labor practice charges against the employer made before the hearing, the Union's brief hints (P. 44) that the employer might protect himself or retaliate by imposing discipline.

This is diametrically opposed to its position that this is a protected strike and this inconsistent stand amounts to an inadvertent concession that the activity is not a strike and Petitioners' whole argument thereby falls. The Wisconsin Board expressly said discipline could have been imposed (R. 21), and in the dissenting opinion of the Wisconsin Supreme Court it is said, "Since the activity was not a strike, I conclude that it is not a protected union activity. It was a breach of shop discipline and an invasion of employer's rights for which the employer may visit upon the participants the penalty of discharge or lesser discipline without committing an unfair labor practice" (R. 125). If that is true, the activity is not protected by the federal law.

Be that as it may, to force an employer to the drastic step of discharge or disciplinary layoff to some two thousand people, (virtually the entire working force) in an effort to obtain compliance with the simplest elements implied by the employment relationship would seem to level a severe blow to industrial peace and that is a situation the Wisconsin legislature has wisely sought to head-off or make less likely to occur.

But aside from the impractibility of such a step in the light of industrial realities, the Union leaders by the very decision they ask here, seek a complete grip on the tools, place and means of production through legalizing its tactics and thus holding over the employer the threat that if the employer does impose discipline, he may be guilty of unfair labor practice charges on the ground that such discipline constitutes an illegal lockout or an interference with the employers "right" to engage in this kind of concerted activity (R. 88).

In other words, it would seem that if the Union's position were sound, the employer could do nothing, and

the employees could do anything, short of actual breach of the peace, no matter how obnoxious or detrimental to the public welfare, so long as it could be considered "concerted action" for "mutual aid".

Such a conception of the rights and duties of employees destroys the essential basis of the employer-employee relationship. The Union bases its brief on the fundamentally fallacious assumption that the indulgence in any type of concerted activity which a Union feels will be of benefit is a right guaranteed by the Constitution and that the Constitution and federal law give employees the *right* to try to enforce *any* demand by *any* type of "economic pressure" they can devise.

The ingenious beclouding of the real issue and the sophistry employed in the Petitioners' brief reaches a climax with the argument on page 45 to the effect that the employees are not seeking to fix the hours or days on which they will work, but that they are merely insisting on "the right not to work"; that is, they seek to fix the hours or days they will *not* work regardless of the implied terms of their contract of employment.

The Wisconsin Board properly found as a fact that here was not an attempt to strike; here, in fact, was a concerted effort to interfere with production by means other than a strike, and by a means which carried to its logical conclusion could lodge complete control of the means and time of production in the Union.

5. The Factual Situation Shows that there Is No Impairment of any Federally Guaranteed Right.

In the last analysis, the facts in a given case are controlling, in determining whether any right specifically

protected either by the Federal Constitution or Federal law has been impaired.

No Federal law guarantees to Union leaders, with immunity from reasonable state control, the right, repeatedly and completely, to stop an employer's operations by calling out the employees at frequent short intervals during a regular work shift, ostensibly to attend union meetings, but in such a way as to disrupt production, inflict severe damage and yet retain control of the jobs.

As we have seen, at the time these production stoppages were conceived, and during the period they were being put in practice, they were never characterized as strikes and claim of justification under a right to strike was never asserted. Justification is claimed on the ground that under the National Labor Relations Act the employees were entitled to engage in concerted activities for their mutual protection (R. 88).

This claim of right, as applied to the facts of the instant case, then must rest squarely on the proposition that that Federal Statute provides that union officials may stop plant operations at any time and as frequently as they may choose by calling out the employees during regularly scheduled working hours with the asserted purpose of attending union meetings or to discuss any matters that might come within the possible compass of mutual aid or protection and yet retain the absolute right of these same employees to return to work when they choose and, therefore, the states are helpless to curb or limit such procedure.

We have already pointed out that by the very acceptance of employment an employee agrees (with certain legally recognized exceptions) to devote certain hours

designated by the employer to that employment. He reserves other hours during which he is free to follow his own pursuits, including concerting with fellow employees on matters relating to their mutual aid and protection or anything else. While collective bargaining contracts, by mutual agreement, may permit certain union officials (stewards or committeemen) to carry on various union activities such as settling grievances, collecting dues or negotiating during working hours, it is inconceivable that any such conduct can be lawfully applied unilaterally by employees en masse or that a state may not place reasonable limitations on such activity.

To say that a Federal law guarantees the right of employees during regular working hours, to walk out en masse at frequent, unannounced and repeated times for the assigned purpose of attending union meetings and yet retain an unquestioned right to return to work whenever they desire, and that the employer is bound to tolerate such conditions and keep the facilities available at all times for such employees, is to say that the Federal Statutes have destroyed the employer's right to operate his business on regular scheduled shifts or hours and that such statutes have delivered to the employees or union officials the right to determine and control, without any bargaining with, or any agreement from the employer, the regular hours, shifts and days during which the business shall operate. Heretofore these matters have been recognized necessarily and unquestionably, to be within the control of management, and they must be so left if a business is to be allowed to function, subject only to limitation by collective bargaining. If the proposition contended for by Petitioners is accepted, collective bargaining is non-essential.

> "If they (the employees) had the right to fix the hours of their employment it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." *C. G. Conn Limited v. National Labor Relations Board* (8th C.C.A.) 108 Fed. 2d 390 at 397; (1939) (our parenthetical insert)

Such a warped construction of the Federal Statute could not but defeat the most beneficial purposes of that statute since such widesweeping impairment of the managerial function of our form of economy could well lead to much industrial chaos with most deterimental repercussions to jobs. The control and proper regulation of a situation such as this has not been denied to the states by Federal law. The Wisconsin Act is a proper state enactment in the interests of sound public policy and in essence is for the protection of the employees themselves to avoid the unwholesome results which would flow from the acquisition of such dictatorial power on the part of irresponsible union leaders.

The argument that since the employer may not suffer as much from the tactics used here as he would by a genuine strike, the tactic should not be controlled, is not tenable. The same might be said for the sitdown or the slowdown which by their very nature could not last over the period of months involved here, but which have, nevertheless, been condemned by the courts. Those are labor tactics which are now admittedly improper and unlawful though having most of the elements which Petitioners say go to make up a strike.

As has been emphasized, the right of employees to quit the employment or to strike as a means of bringing economic pressure upon the employer to agree to bargaining demands in respect of terms of the employment, is

not questioned nor impaired by the Wisconsin law nor the decision below in this case. Nor is the right to hold union meetings at any proper time and place. On the other hand, the right to hold meetings, or to determine the place of meetings, or the times of the meetings are not guaranteed by any law as being unqualified rights which employees may use for the implicit purpose of coercing an employer and controlling the means of production. Nor are they guaranteed to the employees as rights per se no matter how they are to be exercised.

The right to hold meetings, union or otherwise, by employees or any other group is a general right whether considered as the right of free assembly and free speech or as incident to the collective aspects of the employment. That right does not derive from or rest on any idea of its being designed to be coercive upon or to be exercised against or adversely to the interests of an employer or anyone else, and it, like all rights, is subject to reasonable control where used for unlawful ends or where its exercise infringes on co-relative rights of others.

Suppose, the union calls a meeting, not only during regular first shift hours of work, but at the employer's plant, and the second shift employees come into the plant and the first shift employees leave work, at whatever hour they choose, and assemble, at whatever point they choose, in the employer's plant, and consider, as long as they choose, any matters they choose. Suppose this is done repeatedly over a period of months, with the admitted purpose of stopping the plant operations in order to inflict damage upon the employer's business.

It is obvious that whatever concept obtains as to the right of employees to meet or to act in concert for mutual aid and protection, or for any other reason, that "right"

would be perverted and unlawful when so exercised. The mere fact that the meetings were conducted off the premises while the employees still retained such control of the plant and machinery that no one else could use them, does not alter the principle involved. The perversion of the "right" results from the method of exercising it; that is, so as to override and destroy the terms of the employment, the rights of the employer to use his property and the right of others to work at such place of employment, —a method which the State has properly said is not lawful.

In any employment relationship it is necessarily implied that the employees may not repeatedly and without prior notice, during working hours, use their unquestioned right to meet so as to turn the primary function of operation of the business, (which is the production of goods) into a diametrically opposite result, namely, wrecking the operation of the business.

This is as true of employees leaving their work repeatedly during regular work hours, as of employees (whether or not scheduled to work during those hours) who would try to call and hold a meeting in the plant thus stopping the normal plant operation. Either way there is brought about an abuse of the normal purposes and processes of the right of individuals to meet. Either way there is the overriding and destruction, by the perversion of that right, of the fundamental purpose of the employment relation, namely, the production of goods.

Employees who desire in concert to try to stop their employer's production of goods have been told in Wisconsin that they may do so but they have been limited to doing it by a lawfully conducted strike in the generally accepted meaning of the term. In that mild restriction

and proper exercise of the state's police power no federal or constitutional right has been impaired in the slightest degree.

These employees do not have to work for this employer five minutes if they do not wish to; they can strike and they can assemble and they can talk. They may not exercise those lawful *rights* by the unlawful conduct here adopted nor protect them under the asserted guise of "strikes".

C. THE ATTACKED SECTION OF THE WISCONSIN ACT RELATES TO A SUBJECT NOT PRE-EMPTED BY FEDERAL LAW AND IS A REASONABLE AND WHOLESOME EXERCISE OF THE STATE'S POLICE POWER

The Wisconsin Attorney General's brief makes it clear that the factual situation here does not relate to a subject pre-empted by federal legislation and hence it would seem to be self-evident that the state's police power was not improperly exercised in establishing the reasonable regulation of employee conduct here so hysterically denounced.

The validity of that regulation is not tested solely by the language of the Act nor the language of the Board's order, nor as applied to any general factual assumptions. The test is to be applied on the basis *of the specific facts of the instant situation* and treating the Board's desist order as commanding nothing more than that the Petitioners desist from causing repetition of the same type of production interferences. The Wisconsin Supreme Court, determined, as a matter of Wisconsin law, that the limited effect of the Wisconsin Board's order was "to ban the individual defendants and the members of the

union from engaging in concerted effort to interfere with production by doing the acts *instantly involved*" (R. 116, our emphasis).

Petitioner's rights, whatever they may be, are not restricted beyond what the Wisconsin Supreme Court has determined is the meaning and effect of the desist order. Hence, we confine ourselves to consideration of the desist order and its sanction, as so limited,—to prohibiting repetition of the pattern of production stoppages found in the facts in the instant case.

Regulation of matters growing out of the employer-employee relationship has long been a prolific source of exercise of state police power. Workmen's compensation acts, unemployment compensation acts, laws regulating hours of employment, conditions of employment, minimum wages and matters of safety, are but a few instances of such legislation. These enactments are grounded primarily upon a policy which looks to the general public welfare of the community and only secondarily to the specific interests of either employee or employer.

It is of prime public interest and welfare that (aside from the result of a lawful strike) the tools and means of producing goods be not arbitrarily, improperly or unreasonably obstructed and production halted, with the entailing economic waste, and damage to employees, employers and the rest of the public alike. In an earlier day, with small units of production, the absence of specialization or of division of labor and machine tools, a "stoppage of production" might be limited to what that statement implies without any radiating effects upon buying, delivering, storing, preparing the raw materials, scheduling the production for months ahead to conform to a pattern of purchasers' orders, packaging, shipping

and delivering the finished products in a required time sequence. In the present day, however, in plants such as those of the Company, all of those elements are involved, and their co-ordination, integration and timing sequence are absolute essentials to the production of goods in the manufacturing operations.

It was this very element (a planned, timed, co-ordinated, integrated sequence of varying events and operations) that Petitioner Doria rightly recognized to be the Achilles heel of production and which would be at the mercy of interferences, staged during regular work hours, without advance notice, and repeated at such intervals as the Petitioners might choose.

The stoppages produced the intended effect,—complete confusion and disruption, inability to fill purchasers' orders, inability to co-ordinate the handling of materials, inability to integrate deliveries with production and orders and thus, as Petitioner Doria predicted, inflecting greater damage on the business than could have been inflicted by strike.

It is manifestly vital to the public welfare of the State of Wisconsin that such a condition be controlled within reasonable limits. It is difficult to conceive a more appropriate instance for the exercise of reasonable state regulation. To fulfill its duty to the citizens of Wisconsin, the state has not resorted to a penal law. Instead it has preserved to employees their full right to strike with its usual incidents. It has provided a flexible administrative remedy by which, after a hearing before an impartial state board, an admonition is directed to the employees not thus unlawfully to continue such production interferences. There is adequate provision for judicial review. To deny that, in such a situation, Wisconsin

or any other state does not have the police power to cope with this unique but effective method of seizure and control of the means of production, is to say that the public is at the mercy of the Petitioners in the instant case who may with impunity continue to exercise unilateral and dictatorial power over the extent to which the community's tools of production may be used or interfered with.

It was to avoid, if possible, (but with the exception resulting from a legal strike), stoppages of production and the throwing of large numbers of persons out of work, that the clause of the Wisconsin Act in question was enacted. The Act sought to limit within reasonable bounds, tactics of this type on the part of the employees, as well as unfair tactics on the part of the employers, all in the interests of promoting true collective bargaining, industrial peace and uninterrupted production and employment.

The issue is not whether the Union or a court might think that this particular activity is less "harmful" than a strike or not the best way of promoting labor peace or "ought to be encouraged" for reasons urged by the Union at pages 76 and 77 of its brief. What governs is whether this legislation, which seeks by reasonable means, to reduce or limit the type of weapons to be used in economic warfare, actually deprives any person of any *right* which the Constitution says he shall have. Since it does not appear clearly or even possibly that the Constitution or valid federal legislation forbids this type of law, the court will not substitute its judgment for that of the legislature as to what is the best way to protect the public welfare.

We refrain from argument of further points to avoid undue duplication with the Wisconsin Attorney General's brief.

D. CONCLUSION

The Wisconsin Board has found as a fact, on substantial evidence, that no strike was called and that the employees did not engage in a strike in the tactic pursued. That finding has been authenticated by all of the justices of the Supreme Court of the State of Wisconsin.

Analysis of the facts establishes that the Union leaders deliberately adopted a skillful plan to control the means of production and to dictate the terms of employment without engaging in a strike. That conduct has been subjected to reasonable regulation by the State of Wisconsin without depriving the Petitioners or the employees of any constitutional or federal rights whatever.

This court, regardless of what might be its own views, as to the best means of protecting the public in industrial strife, will not substitute its judgment for that of the people of Wisconsin, acting through their legislature, where constitutional or federal rights are not impaired, nor will it lightly strike down reasonable safeguards set up by a State for the protection and welfare of all its citizens.

In the absence of clear proof that guaranteed constitutional or federal rights have been denied, the court will not nullify the sovereign will of the people.

The facts found by the Board on virtually undisputed evidence, establish completely that as applied to the tactics engaged in, the Petitioners have been deprived of no right except the "right" to attempt to take over control of industry by the particular means adopted.

The decision below should be affirmed.

Respectfully submitted,

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